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No. 93-907

In The

Supreme Court of the United States

October Term, 1993

JAMES ARTHUR SHELLING,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should summary judgment be granted against a plaintiff who without explanation voluntarily dismisses his FELA action after the statute of limitations has expired and subsequently attempts to renew his claim by filing a second action?

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STATEMENT OF THE CASE

This case involves the application of well established principles of law concerning the Federal Employers Liability Act (FELA) statute of limitations, 45 U.S.C. § 56. This Court's decision in *Burnett v. New York Central Railroad Company*, 380 U.S. 424, 85 S.Ct. 1050, 13 L. Ed. 2d 941 (1965) is the cornerstone of those principles. The trial court in its lengthy order and the Court of Appeals of Georgia correctly applied *Burnett* to the facts of this case in holding that (1) the Georgia "renewal" statute does not apply so as to extend the FELA statute of limitations, and (2) Shelling is not entitled to tolling where he voluntarily dismissed his action for no stated reason after the statute had expired.

Respondent Southern Railway Company strongly disagrees with Petitioner's contention that the dismissal of his first action was precipitated by a venue problem. In fact, Shelling never claimed that venue prompted his dismissal until he filed a motion asking the Court of Appeals of Georgia to reconsider its decision. The Petitioner's Statement of the Case also contains numerous extraneous facts which are irrelevant to the question at hand. For purposes of continuity, Respondent will outline the facts from the proceedings in the trial court which are pertinent to the limitations issues.

Shelling was employed as a brakeman by Southern Railway Company. On June 26, 1987, Shelling was on a train which struck a tractor-trailer that had stalled on a crossing. On June 23, 1989, he filed his initial suit in the State Court of Fulton County naming as defendants Norfolk Southern Corporation and various trucking-related parties. By consent order, the complaint was amended to drop Norfolk Southern Corporation and add Southern Railway Company as the railroad defendant.

On June 11, 1991, Shelling voluntarily dismissed the trucking defendants, leaving Southern as the sole defendant in the State

Court of Fulton County. On July 5, 1991, Shelling, without explanation, terminated his original action by filing a voluntary dismissal which stated "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice." The voluntary dismissal came more than four years after Shelling's cause of action had accrued on June 26, 1987. On July 8, 1991, three days after the voluntary dismissal, Shelling refiled his action in a court of the same county, *i.e.*, the Superior Court of Fulton County. The sole named defendant in the second action was Southern Railway Company.

The transparency of the Petitioner's venue argument can easily be seen. Shelling did not dismiss his original suit in the State Court of Fulton County for improper venue. If improper venue had prompted the dismissal, he would not have refiled three days later in the exact same county. Rather than dismissing for improper venue, Shelling was engaging in forum shopping within Fulton County (Atlanta) in the mistaken belief that the Georgia renewal statute, O.C.G.A. § 9-2-61, applied to FELA actions. Only after learning that the renewal statute did not apply did Shelling construct his argument that venue led to the dismissal.

In the trial court, Southern moved for summary judgment contending that Shelling's refiling in the Superior Court of Fulton County more than four years after the accident was barred by the statute of limitations. After briefing and oral arguments, the trial court agreed issuing a lengthy order which, among others, found that tolling under *Burnett v. New York Central* did not apply to the facts presented. (App. 3-14).

Petitioner appealed to the Court of Appeals of Georgia which affirmed the trial court in an unpublished opinion. The Court of Appeals expressly adopted the order of the trial court as its opinion stating that "we find the trial court in his order fully and correctly addressed the issues in this case." (App. 1-2). The Supreme Court

of Georgia declined to review the decision on certiorari. (App. 16-17).

REASONS FOR DENYING THE WRIT

I.

UNDER *BURNETT V. NEW YORK CENTRAL*, STATE RENEWAL STATUTES DO NOT EXTEND THE FELA STATUTE OF LIMITATIONS.

An analysis of the bar of the statute of limitations in this case begins with the effect of the Georgia renewal statute, O.C.G.A. § 9-2-61(a). This statute allows a plaintiff who has voluntarily dismissed his action to refile within six months. In pertinent part, it provides:

> If a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewal case shall stand upon the same footing, as to limitation, with the original case.

O.C.G.A. § 9-2-61.

In *Burnett v. New York Central Railroad Company, supra,* this Court refused to incorporate state saving and renewal statutes into the FELA. Reasoning that a variety of state statutes would defeat the aim of national uniformity in the application of the FELA statute of limitations, the Court said:

> This does not mean that we can accept petitioner's argument that the federal limitation provision incorporates the Ohio Saving Statute. To allow the limitation provision to incorporate state saving statutes

> would produce non-uniform periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State. Moreover, not all States have saving statutes . . . . The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity.

380 U.S. at 432-433.

In *Smith v. Seaboard System Railroad, Inc.*, 179 Ga. App. 822, 348 S.E. 2d 97 (1986), the Court of Appeals of Georgia followed *Burnett* and refused to incorporate O.C.G.A. § 9-2-61 so as to save the plaintiff's FELA suit which was refiled less than two months after an involuntary dismissal of his prior action. The court said:

> The court [in *Burnett*], however, refused to incorporate the saving statutes into the FELA statute of limitation because the variety of saving statutes "would produce nonuniform periods of limitation in the several States." *Id.* at 433.

179 Ga. App. at 823.

In *Parham v. Norfolk Southern Railway Company*, 206 Ga. App. 772, 426 S.E. 2d 597 (1992), the Court of Appeals of Georgia again relied upon *Burnett v. New York Central.* There the plaintiff voluntarily dismissed his FELA action more than three years after the date of his injury. He refiled his suit approximately five months later and contended that the Georgia renewal statute applied. The court in *Parham* disagreed and reaffirmed its prior decision in *Smith v. Seaboard* which it noted was based upon the controlling authority of *Burnett v. New York Central.*

Respondent has found no contrary authority holding that state renewal statutes apply to FELA lawsuits. Decisions from the following jurisdictions are in accord: *Price v. Illinois Central Gulf R. Co.*, 584 So. 2d 1279, 1281 (Miss. 1991); *Stine v. Kansas City Term R. Co.*, 564 S.W. 2d 619, 621 (Mo. Ct. App. 1978). *See Davis v. Smith's Transfer, Inc.*, 841 F.2d 139, 140 (6th Cir. 1988); *Gray v. Hallett*, 525 N.E. 2d 89 (Ill. App. 1988) (Although not expressly a holding of each case, both opinions state that *Burnett* declares state saving statutes inapplicable to FELA litigation.) *See also Stephen v. Selvic Marine Towing Co.*, 559 N.E. 2d 147, 150 (Ill. App. 1990) and *Izquierdo v. Cities Service Oil Co.*, 244 F. Supp. 758, 760 (S.D. N.Y. 1965) (holding that state renewal statutes cannot be used in litigation under the Jones Act, 45 U.S.C. § 688, which incorporates the FELA).

Having voluntarily dismissed his suit more than four years after his injury, Shelling cannot claim the benefit of the Georgia renewal statute to surmount a limitations defense. The remainder of this Brief will dismiss the inapplicability of the remaining exceptions to the running of the statute, *i.e.*, tolling for improper venue under *Burnett* and equitable tolling.

II.

THE STATUTE OF LIMITATIONS WAS NOT TOLLED DURING SHELLING'S PRIOR ACTION UNDER THE RULE OF *BURNETT V. NEW YORK CENTRAL.*

Contrary to Petitioner's assertions, the lower courts did not overlook or misapply *Burnett v. New York Central.* The trial court's order analyzed *Burnett* in depth before distinguishing it from the present case. (App. 7-10). As noted previously, the Court of Appeals of Georgia expressly adopted the order of the trial court in its opinion. (App. 2).

Rather than the lower courts, it is clearly Shelling who is misapplying the holding of *Burnett*. In *Burnett*, the plaintiff filed suit under FELA in Ohio for an accident which occurred in Indiana. Subsequent to the running of the three-year limitations period, the Ohio state court found venue to be improper and dismissed the case. The plaintiff refiled in the proper federal court only eight days later; however, the federal court dismissed the action on the ground that the limitations period had run.

On appeal in *Burnett*, this Court first recognized that had the plaintiff's complaint been filed in a federal court where venue was improper, he could have utilized 28 U.S.C. § 1406(a) to simply transfer the action to the proper federal court. Similarly, the Court noted that at that time, 31 states had adopted "transfer" statutes analogous to 28 U.S.C. § 1406(a) which would provide for transfer to a state court of proper venue. 380 U.S. 431, n. 8.

The problem in *Burnett*, however, was that Ohio was one of 19 states which had not adopted a "transfer" statute, and therefore the state court had no choice except to dismiss the original complaint altogether. Had Ohio enacted such a "transfer" statute, then the plaintiff's complaint would have simply been transferred to the court in which venue was proper.

To avoid this procedural anomaly and to create national uniformity in the operation of the FELA in all states, the Supreme Court in *Burnett* held that the FELA statute of limitations would be tolled in the following limited situation:

> . . . when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, ***and the state court action is later dismissed because of improper venue,*** the FELA limitations is tolled during the pendency of the state action.

380 U.S. at 428 (emphasis supplied).

In *Smith v. Seaboard System Railroad, Inc., supra,* the Court of Appeals of Georgia had occasion to apply the rule of *Burnett v. New York Central.* In *Smith,* the plaintiff filed an FELA action on account of a 1979 injury. In 1985, the case was automatically dismissed under Georgia law following a period of five years in which no written order was taken. Less than two months later, the plaintiff refiled his action at a point in time five and one-half years after the date of the accident. The trial court granted Seaboard's motion for summary judgment on the ground that the three-year FELA statute of limitations had expired.

On appeal, the Georgia Court of Appeals in *Smith v. Seaboard* noted that in *Burnett* "the court ruled that the pendency of a timely filed, properly served FELA action, *dismissed because of improper venue,* would toll the FELA statute of limitation." 179 Ga. App. 823 (emphasis supplied). The court refused to extend the holding in *Burnett* to include an automatic dismissal, stating:

> The above analysis convinces us to limit the *Burnett* holding to those cases in which a timely filed and properly served FELA case is dismissed due to improper venue after the expiration of the statute of limitation. Since appellant's initial FELA complaint was dismissed for a reason other than improper venue, the FELA statute of limitations was not tolled during the pendency of the earlier action.

179 Ga. App. at 823.

The trial court in the present case correctly reasoned that *Smith v. Seaboard* suggests that a restrained reading of *Burnett* is in order. If *Smith v. Seaboard* refused to extend *Burnett* so as to cover

involuntary automatic dismissals, it would be inappropriate to extend it even further so as to include Shelling's voluntary dismissal. (App. 9). This is particularly so where Shelling did not dismiss his prior action on account of venue.

The reasoning of *Burnett v. New York Central* leads to the logical conclusion that only involuntary dismissals invoke tolling. The class of plaintiffs that *Burnett* was concerned about were those who faced involuntary dismissals for lack of venue without the saving grace of a transfer mechanism. *Burnett,* thus, had nothing to do with remedying a plaintiff's predicament caused by a voluntary dismissal.

Other courts have similarly construed *Burnett v. New York Central* to apply only to involuntary dismissals. *See McKinney v. CSX Transportation, Inc.*, 298 S. C. 47, 378 S.E. 2d 69 (1989) (no tolling allowed under *Burnett* where plaintiff voluntarily dismissed his first action after the statute had expired); and *Stine v. Kansas City Terminal R.W. Co.*, 564 S.W. 2d 619, 622 (Mo. Ct. App. 1978) (a voluntary nonsuit "alone would appear to remove the instant case from the working realm of the ultimate holding in *Burnett.*").

Thus, *Burnett v. New York Central* has no application in this case because Shelling's complaint in the State Court of Fulton County was not involuntarily dismissed for improper venue. *Burnett* has been narrowly confined to the fact situation it was intended to remedy. Petitioner has cited no case in which *Burnett* has been extended beyond those facts.

Even if *Burnett* might be read broadly enough to cover voluntary dismissals, it would not benefit Shelling because he did not purport to dismiss his prior action due to a lack of venue. The Petitioner's contention that venue prompted the dismissal is at best disingenuous and is affirmatively belied by the record. Shelling's

original action was dismissed on July 5, 1991 by the filing of a voluntary dismissal which simply said "Plaintiff hereby voluntarily dismisses the above-styled action without prejudice." The dismissal said nothing whatsoever about venue. Moreover, a venue problem could not have precipitated Shelling's dismissal because three days later on July 8, 1991, he refiled his action in the very same county.

Surely, Petitioner and his counsel did not believe that dismissing and refiling in Fulton County would cure a venue problem. Obviously Shelling was forum shopping in the erroneous belief that the Georgia renewal statute, O.C.G.A. § 9-2-61, would apply. There is no other explanation for his act of refiling the second action in the same county. Thus, even if *Burnett* might apply to a voluntary dismissal for improper venue, it would not apply here to toll the statute.

Moreover, due to recent developments, it is now doubtful that the limited holding of *Burnett* is even applicable in Georgia. The trial court noted that Georgia has adopted a transfer mechanism which eliminates the venue problem which *Burnett* sought to remedy:

> . . . *Burnett* was primarily concerned with placing plaintiffs in those states without transfer statutes on the same footing as plaintiffs in states with transfer statutes. The injustice which *Burnett* sought to avoid is not present in the instant case because Georgia has a transfer mechanism in place. Pursuant to the Uniform Transfer Rules, "when the court in which the case is pending is alleged to lack jurisdiction or venue or both" the case may be transferred to a court having proper jurisdiction or venue. Unif. Transfer R. T-2. In

> the event of a transfer, "[t]he case shall continue in the court to which transferred as though initially commenced there." Unif. Transfer R. T-13. The Uniform Transfer Rules, therefore, protect a plaintiff who has filed a timely suit in an improper forum, just as *Burnett* was intended to do.

(App. 9-10).

The trial court and the Court of Appeals of Georgia correctly held that under these facts the rule of *Burnett v. New York Central* did not toll the statute of limitations during Shelling's first action.

III.

THE LOWER COURTS CORRECTLY FOUND THAT EQUITABLE TOLLING SHOULD NOT BE APPLIED.

Petitioner further asserts that the doctrine of equitable tolling should be applied to save his action. However, the trial court properly found that Shelling, who voluntarily dismissed his pending action in the State Court of Fulton County, had not "been thrust into the type of fact situation which equitable tolling is intended to address." (App. 11-14).

The trial court first reviewed Georgia case law concerning the relaxation of the statute of limitations in certain extraordinary situations. *See,* for example, *Bank of Jonesboro v. Carnes,* 187 Ga. 795, 2 S.E. 2d 495 (1939) (statute should be extended only upon a showing of "invincible necessity."). (App. 12).

The trial court then turned its attention to federal law and stated the following with respect to the scope of equitable tolling:

> As the Second Circuit Court of Appeals has noted, "Equitable tolling occurs under federal law in two types of situations: (1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). *See also Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959) (defendant misled plaintiff into believing that he had more than three years in which to bring his action); *Osbourne v. United States,* 164 F.2d 767 (2d Cir. 1947) (onset of war prevented plaintiff from bringing his suit).

(App. 13).

Petitioner relies primarily upon a so-called "three prong test" citing the case of *Hosogai v. Kadota,* 147 Ariz. 227, 700 P.2d 1327 (1985), which was not an FELA action. The Petition fails to mention, however, that *Hosogai* refers to a requirement of "extraordinary events" in order for equitable tolling to apply. The court in *Hosogai* enumerated examples where equitable tolling might be applied:

> The equitable tolling doctrine is noted in a number of common law exceptions to statutes of limitations, including: defendant's fraudulent concealment of a cause of action; . . . defendant's inducement of plaintiff not to sue; . . . disability of the suing party; . . . and delays due to war . . .

700 P.2d at 1331.

Shelling's situation is not remotely close to these examples. Shelling's claim was not dismissed due to wrongful conduct of Southern. Nor were there extraordinary forces outside plaintiff's control that caused his voluntary dismissal. As such, equitable tolling does not apply here.

It is not enough that Shelling claims an absence of prejudice or that his actions were prosecuted with diligence. Prejudice *vel non* is not a consideration when a court is faced with whether a lawsuit should be dismissed because of the applicable limitations statute. The statute of limitations is not a mere technicality. It is an absolute bar which is intended not only for the benefit of the Defendant but also for the "general public good." *Bank of Jonesboro v. Carnes*, 187 Ga. 799. Thus, the statute of limitations applies so as to extinguish untimely claims even though the result may sometimes seem harsh and inequitable.

Moreover, if mere diligence and lack of prejudice were sufficient, then virtually every case would at the very least present jury issues with respect to the bar of the statute. This should not be the case. To hold otherwise would, as the trial court observed, thwart the intent of Congress to have a nationally uniform federal limitations provisions if plaintiffs are permitted to toll the statute on FELA claims each time they file a claim in state court. "Shelling's analysis of *Burnett* would permit a FELA claimant to initiate his claim in a state court, pursue it indefinitely, then voluntarily dismiss it only to restart the statute of limitations where he left off at the time of the initial filing."(App. 8-9).

Public policy considerations demand that statutes of limitations not be subject to indefinite extension at the whims of plaintiffs. Only in extraordinary circumstances have courts applied equitable tolling to salvage a claimant's failure to comply with the statute of limitations. Shelling's unilateral act of voluntarily dismissing his complaint without a reason is surely not such a situation.

IV.

THE COURT SHOULD NOT CONSIDER THE CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME IN THE PETITION.

At pages 15-17 of the Petition, Shelling argues that the dismissal of his action violated his due process and equal protection rights under the Fourteenth Amendment to the United States Constitution. Respondent respectfully submits that the Court should decline to consider these arguments because Petitioner failed to raise them at any point in the proceedings below. In *Cardinale v. State of Louisiana*, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969), the Court reaffirmed the long-standing rule that it will not consider constitutional issues first raised in the Petition for Writ of Certiorari:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.

394 U.S. at 438.

Even if the constitutional issues were properly before the Court, it cannot be said that the dismissal of Shelling's complaint was arbitrary or without notice. Petitioner was represented by counsel who by simply reading *Burnett v. New York Central* and *Smith v. Seaboard* should have known that he could not file a voluntary dismissal more than three years after the accident.

CONCLUSION

The Petition does not meet the criteria for review on Writ of Certiorari. The trial court and the Court of Appeals of Georgia correctly applied this Court's decision in *Burnett v. New York Central* in holding that the FELA statute of limitations had run at the time Shelling refiled his action. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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